(7)

No. 98-896

IN THE
SUPREME COURT OF THE UNITED STATES

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the four-year limitations period applicable to civil RICO claims preclude claims filed more than four years after a plaintiff has been injured and has discovered his injury but within four years of the date on which the plaintiff discovers that the injury results from a pattern of racketeering activity?

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to promoting civil justice reform, including tort reform. To that end, WLF has appeared before this Court as well as other federal and state courts to argue against overly expansive theories of tort liability, excessive

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

punitive damages, and imposition of unwarranted attorney fee awards. *See, e.g., BMW of North America, Inc. v. Gore,* 116 S. Ct. 1589 (1996); *City of Burlington v. Dague,* 505 U.S. 557 (1992). In particular, WLF has worked to avoid overly expansive interpretations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq. See, e.g., H.J., Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229 (1989).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned by the increasing invocation of RICO by civil litigants engaged in seemingly run-of-the-mill commercial disputes. As the Court itself recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the civil RICO statute "is evolving into something quite different from the original conception of its enactors." *Sedima,* 473 U.S. at 500. While Congress adopted RICO as a tool to be used in fighting organized crime, civil RICO is now invoked primarily in "everyday fraud cases brought against respected and legitimate enterprises." *Id.* at 499. *Amici* wish to ensure that the seemingly endless expansion of civil RICO claims does not engulf legal principles underlying statutes of limitations. *Amici* also filed a brief with the Court in *Klehr v. A.O. Smith Corp.,* 521 U.S. 179 (1997), a case that raised nearly identical RICO statute of limitations issues.

Amici submit this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement of the Case in Respondents' brief.

In brief, Petitioner Mark Rotella was hospitalized at Brookhaven Psychiatric Pavilion ("Brookhaven") for a 16-month period ending in June 1986. At the time of his release, he was 18 years old. Respondents are physicians and professional associations who had treating privileges at Brookhaven during Mr. Rotella's hospital stay.

Mr. Rotella filed suit against Respondents on July 9, 1997, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, alleging that they conspired to admit, treat, and retain him at Brookhaven for reasons unrelated to his psychiatric condition. Mr. Rotella concedes that he was fully aware, during the 1985-86 time period, that he had been admitted, treated, and retained at Brookhaven. However, he contends that he did not become aware until June 1994 that Respondents had (allegedly) engaged in a pattern of racketeering activity (a necessary element of a RICO cause of action) by conspiring to admit patients to Brookhaven for personal financial gain rather than for a valid medical purpose.

On October 21, 1997, the district court granted Respondents' motion for summary judgment on statute of limitations grounds. Petition Appendix ("Pet. App.") 6-10. The court held that Mr. Rotella's RICO claims accrued when he "knew or should have known of his injury." Pet. App. 9. The court held that Mr. Rotella's injuries were complete and known to him by the time of his discharge from Brookhaven in June 1986. *Id.* Since more than four years elapsed from

that date until suit was filed, the court held that the RICO claims were time-barred under the four-year limitations period established by *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987). *Id.*

On July 30, 1998, the U.S. Court of Appeals for the Fifth Circuit affirmed. Pet. App. 1-5. The appeals court applied the same accrual rule as was used by the district court: a RICO claim accrues as soon as the plaintiff discovers, or reasonably should have discovered, the existence and source of his injury (the "injury discovery" rule). The Fifth Circuit rejected the accrual rule employed by a minority of circuits: the "injury-pattern discovery" rule, whereby a RICO claim does not accrue until the plaintiff discovers both that he has been injured and that the injured is derived from a pattern of racketeering activity. Applying the injury discovery rule, the appeals court determined that Mr. Rotella's RICO claims accrued in 1986 and thus were time-barred. *Id.*

This Court granted a writ of certiorari to consider when a civil RICO claim accrues for statute of limitations purposes, an issue incompletely decided in *Klehr*.

SUMMARY OF ARGUMENT

In fashioning an accrual rule for civil RICO causes of actions, the Court should follow the accrual rule normally applied in federal actions: a civil RICO cause of action accrues when a defendant has violated the substantive provisions of RICO (18 U.S.C. § 1962) and the plaintiffs have discovered (or should have discovered, through due diligence) both the existence and cause of their injuries. There is no basis for further delaying accrual of a civil RICO action until the plaintiff has discovered, or should have discovered, that the defendants' conduct is part of a "pattern of racketeering

activity." Once a plaintiff knows that he has been injured and how the injury was caused, he has been put on notice that he may have legal recourse against those who caused the injury. At that point, it is incumbent on a plaintiff not to sleep on his rights but rather to seek diligently to discover precisely what those rights are.

There may be instances in which the doctrine of "equitable tolling" can be invoked in order to preserve an otherwise time-barred claim, but this is not such a case. Equitable tolling is invoked when the prospective plaintiff (through no fault of any party) simply does not have and cannot with due diligence obtain information essential to bringing a suit. But equitable tolling does not permit a plaintiff to take advantage of the entire limitations period once he has obtained the essential information. Rather, he is required to act diligently and to file suit as soon as it is practicable for him to do so.

Here, Mr. Rotella claims that he first became aware that Respondents had engaged in a pattern of racketeering activity in June 1994 (when the Psychiatric Institutes of America, the owner of Brookhaven, pled guilty to federal criminal charges in connection with its operation of Brookhaven). Because the four-year RICO limitations period (which began to run in 1986) had already expired by that date, the doctrine of equitable tolling (if applicable at all) would have required Mr. Rotella to file suit as soon as practicable after June 1994. Mr. Rotella failed to act diligently; instead, he waited more than three years (until July 1997) to file this suit. Accordingly, Mr. Rotella's RICO claim cannot be saved by the doctrine of equitable tolling. But the existence of that doctrine eliminates whatever unfairness to plaintiffs may arise from adoption of the injury-discovery rule.

ARGUMENT

I. THE LIMITATIONS PERIOD ON PETITIONER'S RICO CLAIM BEGAN TO RUN WHEN HE DISCOVERED HIS INJURY AND THE ELEMENTS OF THE RICO CLAIM EXISTED

Although the statute creating a civil right of action under RICO (18 U.S.C. § 1964)[2] does not contain an express statute of limitations, the Court held in *Agency Holding* that Congress should be assumed to have intended to impose a limitations period on civil RICO actions and that the most appropriate period was the four-year period established under the Clayton Act (15 U.S.C. § 15a) for civil antitrust actions. *Agency Holding*, 483 U.S. at 150. The reasons articulated in *Agency Holding* for adopting a RICO statute of limitations also counsel in support of adoption of the accrual rules suggested by Respondents.

The Court has explained in *Agency Holding* and elsewhere the important purposes served by statutes of limitations. Statutes of limitations:

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[2] Section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

There is considerable doubt whether the injuries alleged by Mr. Rotella constitute injury "in his business or property" within the meaning of § 1964(c). However, the courts below did not base their grant of summary judgment on that issue, and it is not now before the Court.

> [R]epresent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 109, 117 (1979).

The salutary purposes of statutes of limitations would be undermined, of course, if they were combined with accrual-of-action rules that allowed overly lengthy postponement of the commencement of limitations periods. *See Klehr*, 117 S. Ct. at 1989 (any accrual rule that dramatically lengthens the limitation period contemplated by Congress "conflicts with a basic objective -- repose -- that underlies limitations periods."). The Court has stressed, therefore, that accrual rules must be determined with an eye toward the policies underlying the corresponding statute of limitations. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ("Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. . . . In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.").

Establishing a uniform federal rule of accrual in civil RICO cases seems appropriate in light of the concerns that animated *Agency Holding*. That decision held that adoption of a uniform federal statute of limitations in civil RICO cases (as opposed to borrowing the most analogous state-law limitations period) was warranted in order "to avoid intolerable 'uncertainty and time-consuming litigation'" and because of "the lack of any satisfactory state-law analogue to RICO." *Agency Holding,* 483 U.S. at 150, 152 (quoting *Wilson v. Garcia,* 471 U.S. 261, 272 (1985)). Those concerns are equally applicable to the issue of appropriate accrual rules. Indeed, since (as *Johnson* points out) statutes of limitations and accrual rules are so closely interrelated, it would make little sense to determine accrual rules by resort to state law -- which might not reflect the same balance between plaintiffs' and defendants' rights as the federal statute of limitations established in *Agency Holding*.

In deciding that a four-year statute of limitations should apply to civil RICO actions, the Court in *Agency Holding* gave no indication that it believes that civil RICO plaintiffs are entitled to any special degree of solicitude when it comes to determining whether claims are time-barred. *Klehr* similarly lacks language indicating that traditional limitations accrual rules are inappropriate in civil RICO cases. *See, e.g., Klehr,* 117 S. Ct. at 1992. There is no reason why the accrual rule normally applied in federal actions should not be applied here: a civil RICO cause of action accrues when a defendant has violated the substantive provisions of RICO (18 U.S.C. § 1962) and the plaintiffs have discovered (or should have discovered, through due diligence) both the existence and cause of their injuries. *See, e.g., Kubrick,* 444 U.S. at 120-22 (accrual of action under Federal Tort Claims Act, 28 U.S.C. § 2401(b)); *Urie v. Thompson,* 337

U.S. 163, 169-70 (1949)(accrual of action under Federal Employers Liability Act).[3]

By requiring that a substantive violation of RICO exist before the civil RICO statute of limitations begins to run, the Court would fully placate the somewhat fanciful concern of some that under the accrual rules devised by a majority of appeals courts, the civil RICO limitations period could

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[3] While older tort cases traditionally held that a cause of action accrues as soon as the plaintiff is injured without regard to whether the plaintiff is aware of the injury, the more recent trend (which began with medical malpractice cases and has spread to other areas of the law) is to defer accrual until the plaintiff is aware (or should have been aware) of the injury and its cause. *Kubrick,* 444 U.S. at 120-21 & n.7. In most cases, of course, the plaintiff will become aware of an injury and its cause as soon as it is inflicted. But in some cases -- as when the symptoms of a disease develop over the course of many years -- the plaintiff will have no way of discovering that he has been injured until a considerable time after the injury was incurred. Some civil RICO cases undoubtedly fall into that latter category.

In *Agency Holding,* the Court "borrowed" the four-year limitations period contained in § 4B of the Clayton Act, 15 U.S.C. § 15b, for use in civil RICO actions. *Agency Holding,* 483 U.S. at 156. As *Klehr* noted, "discovery" rules generally have not been applied in Clayton Act cases; rather, in private antitrust actions brought under the Clayton Act, the statute of limitation begins to run at the time of injury, without regard to whether the plaintiff has discovered the injury. *Klehr,* 117 S. Ct. at 1992. The adherence to a strict injury accrual rule in Clayton Act cases may be a reflection of the obvious nature of injuries in the typical antitrust case -- and thus the absence of need for a discovery rule in such cases. Because many RICO cases involve claims of fraud where the fact of injury may not become apparent for years, RICO is a far stronger candidate than is the Clayton Act for application of a discovery rule.

expire before an injured party ever had a right to file suit.[4] We term that concern "somewhat fanciful" because we are unaware of any appeals court (including those circuits that have adopted the so-called "injury-discovery" rule) that have held directly that the civil RICO limitations period should begin to run even before a "pattern of racketeering activity" exists. Indeed, a number of appeals courts that have adopted the injury-discovery rule (cause of action accrues as soon as the plaintiff discovers, or should have discovered, his injury) have made clear that a RICO injury cannot be said to exist until such time as the defendant engages in a "pattern of racketeering activity." *See, e.g., Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996), *cert. dismissed*, 117 S. Ct. 592 (1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992).[5]

There is no basis for further delaying accrual of a civil RICO cause of action until after the plaintiff has discovered,

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[4] Those concerns arise from the requirement that a defendant commit two predicate acts before the requisite "pattern of racketeering activity" can be said to exist. 18 U.S.C. § 1961(5). Some have argued that if a plaintiff is injured by the defendant's commission of a single predicate act and if the defendant does not commit a second predicate act until more than four years later, then the limitations period would have expired before the plaintiff could establish that the defendant had engaged in a "pattern of racketeering activity." A rule preventing the running of the statute of limitations until a substantive RICO violation exists (*i.e.*, until the defendant has committed two predicate acts and the other substantive RICO requirements have been met) eliminates this concern.

[5] In any event, even when there is only one injury, the likelihood that a defendant will commit one and only one predicate act is extremely small. For example, Mr. Rotella alleges that Respondents sent numerous letters in connection with their conspiracy to keep him at Brookhaven for improper purposes. Each such letter constituted a separate predicate act: mail fraud. 18 U.S.C. § 1961(1).

or should have discovered, that the defendants' conduct is part of a "pattern of racketeering activity." Once a plaintiff knows that he has been injured and how the injury was caused, he has been put on notice that he may have legal recourse against those who caused the injury. The Court has recognized that it is the "general rule" that the statute of limitation begins to run against such a plaintiff without regard to his knowledge of his legal rights against those who caused the injury. *Kubrick*, 444 U.S. 121 n.7. The Court explained:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the facts of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged.

Id. at 122. A plaintiff who knows that he has been injured at the hands of a defendant is not rendered even more alert to the possibility that he may have legal recourse simply because he learns that the defendant's conduct toward him was part of a pattern of similar conduct engaged in by the defendant. Accordingly, there is no reason not to permit the civil RICO statute of limitations to begin running once the plaintiff knows that he has been injured by the defendant,

without regard to his knowledge of a "pattern of racketeering activity."

II. MR. ROTELLA MAY NOT INVOKE EQUITABLE TOLLING TO REVIVE HIS CLAIM IN THE ABSENCE OF EVIDENCE HE ACTED DILIGENTLY ONCE HE DISCOVERED A PATTERN OF RACKETEERING ACTIVITY

In the rare case in which a plaintiff is unable, despite due diligence, to learn about the defendant's pattern of racketeering activity, equitable tolling is available to prevent inequity. The Court has made clear that federal statutes of limitations are customarily subject to equitable tolling, which shelters a plaintiff from the statute of limitations in cases in which strict application would be inequitable. *Irwin v. Dept. Of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Burnett v. Central R.R. Co.*, 380 U.S. 424, 427 (1965). *See also, Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996)("Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit."); *Phillips v. Heine*, 984 F.2d 489, 491 (D.C. Cir. 1993). Indeed, appeals courts that have held that civil RICO claims accrue without regard to the plaintiffs' knowledge of a pattern of racketeering activity have stated explicitly that equitable tolling may be available in appropriate cases to prevent the expiration of the limitations period against a diligent plaintiff who is unable, despite best efforts, to learn of such a pattern. *See, e.g., Rodriguez v. Banco Central*, 917 F.2d 664, 668 (1st Cir. 1990)(Breyer, J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988) *cert. denied*, 490 U.S. 1009 (1989).

To say that the statute of limitations is subject to equitable tolling in such cases is, of course, significantly different from holding that the statute does not even begin to run until the plaintiff knows, or should know, of the defendant's pattern of racketeering activity. Equitable tolling "gives the plaintiff extra time only if he needs it. . . . The purposes of the doctrine are fully served if the court extends the time for filing by a reasonable period after the tolling period is ended." *Phillips*, 984 F.2d at 492. Thus, under equitable tolling principles, a diligent plaintiff for whom the four-year civil RICO limitations period has already run would be afforded (at most) a several-month extension to file suit after learning of the pattern of racketeering activity -- not the additional four years permitted under the injury-and-pattern discovery rule espoused by Mr. Rotella.

Equitable considerations are considerably different, of course, if the plaintiff has delayed filing suit because of actions by the defendant designed to bring about the delay -- for example, promising not to raise a statute of limitations defense if the plaintiff delays his filing. In such circumstances, the defendant's culpable conduct may justify invocation of "equitable estoppel" whereby the period within which the defendant is subject to suit is lengthened considerably. *See, e.g., United States v. Beggerly*, 118 S. Ct. 1862, 1869 (1998) (Stevens, J., concurring). But there is no allegation that Respondents took any action designed to dissuade Mr. Rotella from filing suit after his release from Brookhaven. In the absence of evidence of such conduct, Mr. Rotella should be confined to ordinary principles of equitable tolling in seeking an extension of the four-year limitations period afforded to him.

Mr. Rotella's assertion that he is entitled -- following his 1994 "discovery" of a pattern of racketeering activity -- to a four years within which to file suit is inconsistent with equitable tolling principles. As the Seventh Circuit has explained, equitable tolling:

> [G]ives the plaintiff extra time *if he needs it*. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations. Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore should not be given grudging application. They protect important social interests in certainty, accuracy, and repose. . . . We should not trivialize the statute of limitations by promiscuous application of tolling doctrines. When we are speaking not of equitable estoppel but of equitable tolling, we are (to repeat) dealing with two innocent parties and in these circumstances the negligence of the party invoking the doctrine can tip the balance against its application -- as it did, for example, in [*Irwin v. Dept. Of Veterans Affairs*, 498 U.S. at 96].

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452-53 (7th Cir. 1990) (emphasis added), *cert. denied*, 501 U.S. 1261 (1991). *See also Irwin*, 498 U.S. at 96 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Klehr*, 117 U.S. at 1993 ("In [the] context [of civil RICO], we conclude that 'reasonable diligence' does matter.")

Under the appropriate civil RICO accrual rule outlined above, Mr. Rotella's claims are clearly time-barred. By the time of his release from Brookhaven in 1986, he was fully

aware of his injury. Even accepting for the sake of argument that equitable tolling principles are applicable because he could not have discovered the existence of a pattern of racketeering activity until June 1994 at the earliest (when Psychiatric Institutes of America, the owner of Brookhaven, pled guilty to federal criminal charges in connection with its operation of Brookhaven), those principles do not justify Mr. Rotella's additional three-year delay in filing suit. Rather, due diligence principles required him to file suit *as soon as* he learned of the alleged pattern of racketeering activity. In the absence of any explanation in Mr. Rotella's brief for his three-year delay, equitable tolling cannot save this suit. *See, e.g., Phillips v. Heine*, 984 F.2d at 492 (equitable tolling cannot excuse 9 ½-month delay in filing suit after final obstacle to suit is removed).

Amici do not mean to suggest that *every* RICO plaintiff is entitled to rely on equitable tolling; it should only apply in those rare instances in which no amount of diligence could have uncovered the requisite pattern of racketeering activity. But when it is applicable, equity provides an aggrieved plaintiff with only enough additional time to prepare and file his suit after learning the necessary facts; it does not set the clock at zero and give the plaintiff four additional years within which to file suit. *Id.* Three years was an unreasonable amount of time for Mr. Rotella to delay following the date on which he became fully aware of all relevant facts. Accordingly, equitable tolling provides him no support.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

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